

**IN THE TOWN PLANNING APPEAL BOARD**

Town Planning Appeal No. 2 of 2019

---

BETWEEN

Million Base Properties Limited

Appellants

Million Basis Property Limited

and

Town Planning Board

Respondent

---

Appeal Board : Mr. Paul LAM Ting-kwok, SC (Chairman)

Ms. Irene CHOW Man-ling (Member)

Mr. Thomas HUI Chun-sing (Member)

Ms. Julienne JEN (Member)

Mr. Edwin YEUNG Chi-wai, MH (Member)

In Attendance : Ms. Lesley LEUNG (Secretary)

Representation : Mr. Benjamin Yu, SC, Counsel for the Appellant

Mr. Anthony Ismail, Counsel for the Appellant

Mr. Jin Pao, SC, Counsel for the Respondent

Mr Julian W.C. Lam, Counsel for the Respondent

Dates of Hearing : 21 to 23 September 2020

Date of Decision : 24 November 2020

## **DECISION**

	<u>Table of contents</u>	<u>Paragraph numbers</u>
A.	Introduction	1-3
B	The Site	4-11
C.	The Zoning of the Site	
C1.	The present zoning of the Site	12-13
C2.	The history	14-17
C3.	“R(A)” sites in general	18-25
D.	TPB Guidelines No.5	26-27
D1.	The history	28-33
D2.	The content	34-37
E.	The Application	38-39
F.	The TPB Decision	40-45
G.	This Appeal	46-50
H.	The Nature of this Appeal	51-57
I.	General Approach to considering planning permission	58-64
J.	The Planning Intention (Issues 1 & 2)	65-88
K.	The Planning Criteria (Issues 3 & 4)	89-98
L.	Shortage of Housing (Issue 7)	99-110
M.	The Main Planning Criteria under §2 of the Guidelines	111-127
N.	§3 of the Guidelines (Issue 5)	128-135
O.	Undesirable Precedents	136-145
P.	Conclusion (Issues 6 & 8)	146-154

### ***A. INTRODUCTION***

1. This is the Appellants’ appeal against the decision (“the TPB Decision”) of the Town Planning Board (“TPB”) on review under s.17 of the Town Planning Ordinance (“TPO”) (Cap. 131) made on 11 January 2019 whereby it rejected the Appellants’ application for a proposed Office and Shop and Services/Eating Place in the “Residential Group A” zone at 3-6 Glenealy, Central, Hong Kong (“the Site”) in Application No. A/H3/438 (“the Application”).

2. The main issues in this Appeal concern the proper interpretation and application of the relevant draft outline zoning plan (including its notes), the explanatory statement of such plan as well as the applicable guidelines for planning permission in the present context.
3. Save on one critical issue (which will be identified below), this decision represents the unanimous views of the five members of this Appeal Board.

**B. *THE SITE***

4. The Site is located at Nos. 3-6 Glenealy with a steep gradient in the Central District, and is within a triangular street block bounded by Glenealy in the east, Wyndham Street in the north and Arbuthnot Road in the west. Its area is 1,088.3m<sup>2</sup>.
5. The Site is now occupied by two residential buildings at 3-4 Glenealy (with 9 storeys), known as Yuen Lam Building (園林大廈); and 5-6 Glenealy (with 11 storeys), known as 鐵崗, providing a total of 73 flats, with a retail shop on the G/F of 3-4 Glenealy. These buildings were built in the 1960s.
6. The Site is immediately surrounded by mainly residential developments with Greenville to its immediate northeast; Glenealy Mansion and 8-9 Glenealy to its immediate southwest; Fortune Court, Mandarin Court, Arbuthnot House and Shiu King Court to its immediate northwest.
7. To the further west of the Site across Arbuthnot Road is another street block bounded by Caine Road. This street block is also largely residential in nature comprising, for example, Cordial Mansion, Yuen Ming Building, Bel Mount Garden and Botanical Court.

8. To the east of the Site across Glenealy is the Hong Kong Sheng Kung Hui Compound including St. Paul’s Church Kindergarten, SKH St. Paul’s Church (Episcopal) and the Hong Kong SKH Welfare Council, and the Caritas cluster including Caritas House and the Cathedral of the Immaculate Conception (Roman Catholic).
9. To the further north and northeast of the Site are mixed commercial and residential developments abutting Wyndham Street.
10. In a wider context, the Former Central Police Station Compound (now known as Tai Kwun), the Hong Kong Zoological and Botanical Gardens, and the Government House are located to the west, south and east of the Site respectively. Lan Kwai Fong is located about 80m to the north of the Site. SOHO (south of Hollywood Road), with upmarket bars and eateries, is located to the further north of the Site.
11. The Site is about 300m away from the Central MTR Station. Glenealy is one of the entry points to Central. Vehicles travelling along Upper Albert Road can reach Glenealy via Albany Road and then enter the Central via Wyndham Street or Ice House Street. Vehicles to the Central from the east and the south can bypass Queen’s Road Central by travelling along Glenealy.

## ***C. THE ZONING OF THE SITE***

### ***C1. The present zoning of the Site***

12. The Site falls within an area zoned “Residential (Group A)” (“R(A)”) on the Approved Sai Ying Pun & Sheung Wan Outline Zoning Plan No. S/H3/31 (approved on 5 December 2017) in force at the time of the section 16 application; the Draft Sai Ying Pun & Sheung Wan OZP No. S/H3/32 (exhibited for public inspection on 21 September 2018) in force at the time

of the section 17 application; and the Draft Sai Ying Pun & Sheung Wan OZP No. S/H3/33 (“the Draft OZP”) (exhibited for public inspection on 9 August 2019), which is currently in force. There is no material difference between these plans; and for the present purpose, we shall focus on the Draft OZP.

13. The total area of the “R(A)” sites in the Draft OZP is 38.58ha.

## **C2. The history**

14. The Site was initially zoned “Commercial/Residential” (“C/R”) on the outline zoning plans in respect of Sai Ying Pun & Sheung Wan since the first statutory plan was gazetted in the 1970s. For sites within “C/R” zones, commercial, residential and mixed commercial/residential uses were always permitted. The Site was rezoned to “R(A)” in the Draft Sai Ying Pun & Sheung Wan OZP No. S/H3/24 issued on 7 May 2010 in the following circumstances.

15. In March 2003, the Planning Department completed the “Stage II Study on Review of Metroplan”. In section 3.4 of the Executive Summary “Opportunities for land use change”, it was stated that “Rezoning land from its current OZP zoning to another use can offer significant opportunities for change in land use as well as redevelopment of obsolete buildings” and the main opportunities involved, *inter alia*, rezoning certain sites “from Commercial/Residential to Commercial, Residential or other uses”. Under section 4 “Metroplan Strategic Planning Policies”, it was provided, *inter alia*, that:

“E6 *In Hong Kong Island Commercial zoning should, where appropriate, be extended into areas currently with Commercial/Residential zoning but not primarily in or well suited to family residential use. Rezoning of appropriate parts of the C/R zone to Commercial use will provide opportunities for the orderly expansion of the main Commercial areas while minimizing undesirable impacts on the residential environment. In areas currently zoned C/R, the developer can choose whether to*

*build a residential or an office building (either of which would usually have a retail podium) or a combination of the two. As the long term land use within C/R zones is determined by short term variations in demand, offices and residential blocks are often intermixed, with consequent drawbacks for residents. Areas developed largely for offices do not usually offer a full range of residential amenities for family requirements, such as appropriate open space and community facilities. Also, office buildings create a denser, more oppressive environment for residential use, blocking views and reducing domestic privacy.*

*Only those parts of the C/R zones which are well located for office use should be rezoned to Commercial. These will be primarily on the margins of the Central Business District and its de facto extensions into parts of Western, Wan Chai and Causeway Bay. They should be within easy walking distance of a rail station and environmentally unsuitable for residential use.”*

“E8 *Where appropriate, areas in Hong Kong Island currently with Commercial/Residential zoning but primarily in or well suited to residential use should be rezoned to Residential use so as to reduce the potential increase in office development on Hong Kong Island and protect the residential environment. Much of the 150 ha of land with C/R zoning in Hong Kong Island comprises older residential buildings with potential for redevelopment. If employment growth is to be contained on Hong Kong Island, this reservoir of potential office development, most of which would not be suitable for Grade A offices, needs to be reduced. By rezoning appropriate parts of the C/R zones to Residential the likelihood of their redevelopment for residential purposes could be increased. This could also facilitate the efficient provision of transport and community infrastructure by reducing the uncertainty as to the type of development that will take place in C/R zones.”*

16. Under Section 6.2 “Housing and Urban Renewal Action Plan”, in relation to the “Existing areas with limited change expected”, it was provided, *inter alia*, that:

“(a) *Expansion of Residential zone*  
Selected areas in Hong Kong Island and Tsuen Wan currently with C/R zoning but primarily in or well suited to residential use should be rezoned to Residential (A). The main areas are likely to be in Eastern Hong Kong Island, at Aberdeen, at Tsuen Wan/Kwai-Tsing, with more

limited areas on the periphery of the office areas in Central, Wanchai and Causeway Bay.

Actions required to implement the policy include:

- Study of potential for rezoning of C/R zones to Residential in Hong Kong and Tsuen Wan.

The rezoning exercise should be undertaken for these areas on a streetblock basis, taking into account the following criteria:

- existing use almost entirely residential
- environmental suitability
- continuity of zoning to avoid randomly interspersed Commercial and Residential zones
- site configuration and ownership with potential for amalgamation.”

17. To follow up on the recommendations of the “Stage II Study on Review of Metroplan”, a land use review of the “C/R” sites on the Sai Ying Pun & Sheung Wan OZP was undertaken. The area to the north-east of the Site was rezoned from “C/R” to “C”, while the remaining “C/R” sites (including the Site), which were then predominantly residential in nature with lower floors used for retail/commercial activities and akin to “R(A)” type of development, were rezoned to “R(A)” under the Draft Sai Ying Pun & Sheung Wan OZP No. S/H3/24 (which was exhibited for public inspection on 7 May 2010). As mentioned, the Site has been zoned “R(A)” in the subsequent plans since then.

### ***C3. “R(A)” sites in general***

18. The Schedule of Uses of different zones in the Notes to the Draft OZP consists of two columns: Column 1 covers “uses always permitted” whereas Column 2 covers “uses that may be permitted with or without conditions on application to the Town Planning Board”.
19. According to the Notes to the Draft OZP, for sites zoned under “R(A)”, “Office”, “Shop and Services” and “Eating Place” are always permitted on the lowest three floors of a building (taken to include basements); or in the

purpose-designed non-residential portion of an existing building, both excluding floors containing wholly or mainly car parking loading/unloading bays and/or plant room. However, for other floors, such uses “may be permitted with or without conditions on application to the Town Planning Board” according to Column 2 of the Notes.

20. In the Notes to the Draft OZP, the “Planning Intention” of “R(A)” zone is stated as follows:

“This zone is intended primarily for high-density residential developments. Commercial uses are always permitted on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building.”

21. In contrast:

(a) For sites zoned “Commercial”, office, shops and services are uses always permitted. The planning intention is that:

“This zone is intended primarily for commercial developments, which may include uses such as office, shop, services...”

(b) For sites zoned “Residential (Group C)”, office, shops and services are not permitted at all. The planning intention is that:

“This zone is intended for low to medium-rise residential developments subject to specific plot ratio and building height restrictions to preserve the local character and to avoid adverse visual, air ventilation and traffic impacts from more intensive development.”

22. §4.1 of the Explanatory Statement explains the Notes of the Draft OZP as follows:

“Attached to the Plan is a set of Notes which shows the types of uses or developments which are always permitted within the Area and in particular zones and which may be permitted by the Board with or without conditions, on application. The provision for application for planning permission under section 16 of the Ordinance allows greater flexibility in land use planning and control of development to meet changing needs.”

23. §8.2.1 of the Explanatory Statement concerning “R(A)” zone provides that:  
“This zone is intended primarily for high density-residential developments. Commercial uses such as shop and services and eating places are always permitted on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building. Commercial uses on any upper floor above the lowest three floors or the purpose-designed non-residential portion will require planning permission from the Board. Offices and hotel development may also be permitted upon application to the Board.”
24. §8.2.2 provides further that:  
“Areas zoned for this purpose cover established residential neighbourhoods bounded by Connaught Road West and Des Voeux Road West to the north, Central Street to the east, Queen’s Road Central and Hollywood Road to the northeast, and Caine Road and Bonham Road to the south.”
25. §13.3 states:  
“Planning applications to the Board will be assessed on individual merits. In general, the Board’s consideration of the planning applications will take into account all relevant planning considerations which may include the departmental outline development plans/layout plans and guidelines published by the Board. The outline development plans and layout plans are available for public inspection at the Planning Department. Guidelines published by the Board are available from the Board’s website, the Secretariat of the Board and the Technical Services Division of the Planning Department...”

**D. TPB GUIDELINES NO. 5**

26. In the *Guidance Notes for Applications for Permission under Section 16 of the Town Planning Ordinance* (Cap. 131), §20 provides that:  
“A number of guidelines for planning applications have been promulgated by the Board. These guidelines set out the factors which the Board normally takes into account when considering particular applications, and may therefore be of assistance to applicants in preparing their applications.”
27. In December 1990, the TPB published TPB PG-No. 5 “Town Planning Board Guidelines for Application for Office Development in Residential (Group A) Zone under Section 16 of the Town Planning Ordinance” (“the Guidelines”).

The Guidelines has been in force ever since. They apply to sites zoned as “R(A)” only.

**D1. The history**

28. The Guidelines were proposed by TPB Paper No. 1101 for consideration at the TPB meeting on 24 November 1989.

29. §1.1 of the paper stated that “office developments” shall include not only pure office buildings, but also office buildings which have some commercial elements such as restaurants and shops on the lower floors.

30. The paper set out various planning considerations which had been taken into account in previous applications. It stated, *inter alia*, that:

“3.2.7 ...For some predominantly residential neighbourhoods, the planning intention should be to retain the residential character and discourage the infiltration of excessive commercial developments...”

“3.3.2 The compatibility of a proposed office development with the existing land uses in the neighbouring area has been an important factor considered by the Board. This is related to the existing and planned character of the area concerned. If an area is predominantly residential and there is a planning intention to preserve the existing residential character, applications for office development have often been rejected. However, where the land uses are already rather intermixed, other factors are more important when determining an application.”

“3.3.3 ...Thus, particular attention should be paid to assess whether there will be a specific environmental gain, rather than general environmental improvement, when a certain ‘R(A)’ site is developed into an office building.”

“3.4.1 While the economic viability of individual office developments is an entrepreneurial consideration, the wider economic context in which such development will take place is a relevant point for consideration by the Board. The trend of economic development in Hong Kong and hence the effects on land development as well as the levels of supply

and demand for office floorspace in particular areas are factors that need to be considered. For a particular area where the trend of land development is towards increasing office developments, and there is a proven demand for more office accommodation that cannot be met by existing and planned supply, applications for office developments at suitable locations may be favourably considered.”

“3.5.1 The granting of planning permission for an office development may sometimes create an undesirable precedent which would made it more difficult to refuse permission for similar development in future...”

31. §4.1.1 provided:

“Suitable areas of ‘R(A)’ zone have in the past been, and should continue to be, rezoned to ‘C/R’ or ‘C’ to reflect the planning intention of encouraging more commercial/office developments in certain areas...”

§4.1.2 then stated:

“In the borderline areas, however, it is proposed that the ‘R(A)’ zoning should be maintained so that better control can be exercised on such matters as site selection, building design for non-residential uses, and the provision of parking and loading/unloading facilities.”

32. In §6 “Conclusion and Recommendation”, §6.1 provided that:

“The various planning consideration discussed above form a general set of guidelines for considering future office development applications in ‘R(A)’ zone. However, it is important to note that *future office development application should still be considered on individual merits, and the weighting of the various planning considerations should vary in determining individual applications.* While the wider district planning context and the potential general impacts such as reducing population density, meeting office demand and increasing local development, should be taken into account in considering an application for office development, they should best be considered through zoning reviews of existing outline zoning plans in the context of the Metroplan. It is suggested that *more weight should in future be put on the specific attributes and immediate effects of a proposed office development at the specific location.*” (emphasis added)

33. §12 of the minutes of the TPB meeting provided that “The main proposal was that in future more weight should be put on local site factors such as size of

site, building design and provisions of on-site loading/unloading facilities”.

**D2. The content**

34. There is an “Important Note” at the beginning of the Guidelines, stating, *inter alia*, that:

“The guidelines are intended for general reference only. The decision to approve or reject an application rests entirely with the Town Planning Board and will be based on individual merits and other specific considerations of each case.”

35. §1 “Scope and Application” provides that:

“1.1 Because of the expanding commercial activities in recent years, there has been an increasing demand for office units outside the central business district. The Town Planning Board’s intention is to meet part of the increasing demand through permitting the redevelopment of residential buildings within the “Residential (Group A)” zone for office use in districts where there is a demonstrated demand.

1.2 In considering applications for office development, which may sometimes incorporate commercial uses on the lower floors, the primary objective of the Town Planning Board (the Board) is to ensure that the buildings are in the right locations and that no land use conflicts and environmental nuisance will be created. They should be of an adequate size and properly designed for office use, and the Board will need to be satisfied that no traffic congestion or disruption to traffic flow on adjacent roads will result from the change of use.”

36. Having regarding to these objectives, §2 of the Guidelines sets out the six “Main Planning Criteria”:

“(a) The site should be sufficiently large to achieve a properly designed office building. The minimum site area requirement for office development varies with site configuration and loading/unloading requirements in particular localities.

(b) There should be adequate provision of parking and loading/unloading facilities within the site in accordance with the Hong Kong Planning Standards and Guidelines and to the satisfaction of the Transport Department. For sites with narrow frontage, where on-site loading/unloading requirement cannot be met, the applicant should

demonstrate that there are alternative locations for loading/unloading facilities to the satisfaction of the Transport Department.

- (c) The site should be at an easily accessible location, e.g. close to the Mass Transit Railway Station or well served by other public transport facilities.
- (d) The proposed office development should not cause congestion and disruption to the traffic flow of the locality. In areas prone to traffic congestion, the application may be required to provide a traffic impact assessment of the proposed office development.
- (e) The proposed office building should be compatible with the existing and planned land uses of the locality and it should not be located in a predominantly residential area.
- (f) The proposed office development should be purposely designed for office/commercial uses so that there is no risk of subsequent illegal conversion to substandard domestic units or other uses.”

37. §3 of the Guidelines states:

“In general the Board will give favourable consideration to planning applications for office developments which produce specific environmental and planning gains – for example, if the site is located near to major sources of air and noise pollution such as a major road, and the proposed office development is equipped with central air-conditioning and other noise mitigation measures which make it less susceptible to pollution than a residential development. Other forms of planning gain which the Board would favour in a proposed office development would include public open space and community facilities required in the planning district.”

#### ***E. THE APPLICATION***

38. On 24 April 2018, the Appellants made the Application under s.16 of the TPO.

39. The Application involves a proposed office development. The two existing residential buildings at 3-4 Glenealy and 5-6 Glenealy will be redeveloped into a 22-storey office building, which comprises 4 levels of shops/eating places (on the LG/F, G/F, 1/F and 2/F), 15 levels of office floors (on 3/F to 17F), office lobby, café and 6 loading/unloading bays on LG/F, 70 car parking spaces on B1/F to B3/F and electrical and mechanical facilities on G/F to 2/F, 18/F and 19/F. The total building height is 131.15mPD (at main roof level).

The site area of 1,088.3m<sup>2</sup> yields a total of 13,049.38m<sup>2</sup> non-domestic gross floor area with a plot ratio of 12.

**F. THE TPB DECISION**

40. On 7 September 2018, the Application was considered and rejected by the Metro Planning Committee (“MPC”) of the TPB on the following grounds:
  - “(a) the proposed office development is not in line with the planning intention of the “R(A)” zone which is for high-density residential developments. The approval of the application will result in a reduction of housing supply;
  - (b) the applicant fails to demonstrate that the site is not conducive to residential development; and
  - (c) approval of the application will set an undesirable precedent for similar applications in the same “R(A)” zone. The cumulative effect of approving such applications will aggravate the shortfall in the supply of housing land.”
41. On 21 September 2018, the Appellants were informed of the MPC’s decision.
42. On 12 October 2018, the Appellants applied for a review under s.17 of the TPO. The Appellants made written representations with the support of a research report and legal opinion.
43. On 11 January 2019, the review was considered by the TPB. For the purpose of the review, the Planning Department prepared a TPB Paper No. 10510. The Appellants’ representatives made oral submissions and answered questions raised by TPB’s members.
44. In the TPB Decision made on 11 January 2019, the TPB rejected the Application for the following reasons:
  - “(a) the planning intention of the “Residential (Group A)” (“R(A)”) zone is for high-density residential developments. You have not demonstrated that there are sufficient justifications to deviate from the planning

- intention of the “R(A)” zone; and
- (b) approval of the application will set an undesirable precedent for similar applications in the same “R(A)” zone. The cumulative effect of approving such applications will aggravate the shortfall in the supply of housing land.”

45. On 25 January 2019, the Appellants were informed of the TPB Decision.

**G. THIS APPEAL**

46. On 15 March 2019, the Appellants lodged a Notice of Appeal pursuant to s.17B of the TPO.

47. The grounds of appeal set out in the Notice of Appeal may be summarized as follows:

- (a) The TPB’s reason that the Appellants had not demonstrated that there are sufficient justifications to deviate from the planning intention of the “R(A)” zone in the Draft OZP is not a legally sound, and/or sufficient and/or good reason. In particular, the TPB has misinterpreted and misunderstood the planning intention of such zone.
- (b) The TPB’s reason that the approval of the application for the proposed development will set an undesirable precedent for similar applications in the same “R(A)” zone in the Draft OZP is not a legally sound, and/or sufficient and/or good reason.
- (c) The TPB’s reason that the cumulative effect of approving such applications will aggravate the shortfall in the supply of housing land is not a legally sound, and/or sufficient and/or good reason.

48. The parties have identified eight issues in an Agreed List of Issues (one of which is not agreed by the Respondent) as follows:

- (a) What is the planning intention for the Site, which is within the “R(A)” zone on the Draft OZP, and is the proposed office development in line

with such planning intention?

- (b) In particular, is the reference to “this zone is intended primarily for high-density residential developments” in the Explanatory Statement referable to the 38.58ha zone as “R(A)” in the Draft OZP, or to an area of 4,334m<sup>2</sup> within the said “R(A)” zone? (not agreed by the Respondent)
- (c) What are the planning criteria for permitting the redevelopment of residential buildings within the “R(A)” zone for office development?
- (d) To what extent are the planning criteria for permitting the redevelopment of residential buildings within the “R(A)” zone for office development set out in the Guidelines?
- (e) What, on the true interpretation of the Guidelines, is the effect of §3 of the Guidelines?
- (f) Does the proposed office development meet the planning criteria for permitting the redevelopment of residential buildings within the “R(A)” zone for office development?
- (g) Whether shortage of housing is a relevant planning consideration or criteria for the purpose of determining whether the TPB should grant permission under s.16 in this case?
- (h) Are the TPB’s reasons for rejecting planning intention permission in, *inter alia*, the Board’s letter dated 28 January 2019 good reason? If not, should planning permission be granted or refused by this Appeal Board in the exercise of its own independent judgment in accordance with the law?

They will be referred to as Issues 1 to 8 respectively below. We shall deal with some of the interrelated issues together in an order as we think fit.

49. For the purpose of this appeal:

- (a) Mr. To Lap Kee Kenneth of Kenneth To & Associates Limited, an urban planner gave oral evidence for the Appellants. Mr. Chin Kim

Meng, a traffic engineer; and Mr. Leung Sai Hung, a registered architect, made witness statements without giving oral evidence.

- (b) Mr. Austin Joseph Jerry, who is now an acting Chief Town Planner (who used to be Senior Town Planner/Hong Kong 4 of the Hong Kong District Planning Office), Planning Department of the Government of HKSAR, gave oral evidence for the Respondent.

50. It is unnecessary for us to recite the evidence and the parties' submissions in detail. Suffice to say that we have considered all the evidence and submissions made by the parties.

## ***H. THE NATURE OF THIS APPEAL***

51. S.17B(6) of the TPO provides that:

“Prior to or at the hearing of an appeal, an Appeal Board may –

- (a) consider and determine whether a party should have access to documents which the party claims are relevant to the appeal and which are in the possession or control of another person and order that other person to give the party access to such documents;
- (b) hear evidence on oath and administer any oath necessary to swear in a witness;
- (c) admit or take into account any statement, document, information or matter whether or not it would be admissible as evidence in a court of law;
- (d) by notice in writing summon any person to appear before it to give evidence and to produce any document or other thing specified in the notice.”

52. S.17B(8) of the TPO provides that:

“At the completion of the hearing of parties appearing at an appeal or at any adjourned hearing, an Appeal Board may-

- (a) adjourn for such period as it considers necessary to reach its decision;
- (b) confirm, reverse or vary the decision appealed against;
- (c) award to a party such costs legal or otherwise as it considers reasonably incidental to the preparation and presentation of an appeal.”

53. The burden is on the Appellants to demonstrate to the Appeal Board that the TPB’s decision was wrong and should be reversed or varied (*Town Planning Appeal No. 15 of 2011* (27 February 2014), §26).

54. In *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 266A, the Privy Council held that:

“The Appeal Board were, of course, entitled to disagree with the Town Planning Board. Their function was to exercise an independent planning judgment.”

55. In *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196 at 232, §88, Tang PJ observed that:

“...On appeal to the Appeal Board, the Appeal Board is entitled to and regularly makes planning decisions under s.16 *de novo*, assisted by expert evidence which would be subject to cross-examination, if necessary. Therefore in an appeal against refusal of permission or the conditions imposed, the Appeal Board would exercise its own independent judgment on the appropriateness of the refusal or the conditions...”

56. The Appeal Board could substitute its own decision for that of the TPB even if the TPB had not strictly committed any error on the materials before it, as the hearing before the Appeal Board would normally be much fuller and more substantial than a review hearing under TPO s. 17 (*Town Planning Appeal No. 15 of 2011* (27 February 2014), §18).
57. While this Appeal Board will consider the grounds of appeal raised by the Appellants against the TPB Decision, we shall exercise our own independent judgment in the light of the evidence and submissions put before us.

**I. GENERAL APPROACH TO CONSIDERING PLANNING PERMISSION**

58. The Appellants remind this Appeal Board that article 5 and article 105 of the Basic Law on private property rights are engaged in the present context. However, as Ribeiro PJ held in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at 423, §130:

“A final point might be mentioned by way of guidance to the Board. It should be emphasized that it is the Court which had the ultimate responsibility for determining whether any restriction imposed by the Board can be subjected to a successful constitutional challenge. The Board’s role is to carry out its duties and to exercise its powers in accordance with the TPO. To adapt what Lord Hoffmann said in *R(SB) v Governors of Denbigh High School* [2007] 1 AC 100, [68], members of the TPB cannot be expected to make the Board’s planning decisions with textbooks on human rights law at their elbows. No doubt the Board will receive appropriate legal advice including advice regarding the property rights of others guaranteed by the Basic Law. But it is not the Board’s task to conduct a proportionality analysis, much less to mouth incantations about proportionality in rendering its decisions.”

59. The private property rights of the Appellants are subject to restrictions “prescribed by law”. In principle, they include not only the relevant statutory provisions but also the common law as well as published public policy and guidelines (*Chee Fei Ming v Director of Food and Environment Hygiene* [2020] 1 HKLRD 373). It is the duty of the TPB and the Appeal Board to construe and apply these restrictions properly and reasonably.
60. It is important to bear in mind that the power to grant planning permission must be exercised within the parameters of the relevant approved plan. The Appeal Board is bound by s.16(4) of the TPO in that it may grant permission “only to the extent shown and provided for or specified in the plan” (*Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 261F). Hartmann JA (as he then was) held in *International Trader Ltd v Town Planning Appeal Board and another* [2009] 3 HKLRD 339 at 351, §48:
- “In my judgment, when considering a s.16 application for permission under and in terms of an approved plan, the Board is not given a blank canvas. The canvas is already painted with the relevant approved plan. That being so, while the Board’s discretion is a broad one, it is evident that the Ordinance, considered as a whole, requires that the discretion be exercised within the limits of the relevant approved plan. Put another way, the approved plan is not merely a relevant consideration, one which the Board may, for cogent reason, ignore.”

Hence, the learned judge concluded at p. 352, §51:

“In summary, therefore, I am satisfied that, on a true construction of the Ordinance, when determining an application for planning permission under s.16, the Board does not have the power to have regard to any and all planning considerations which it believes will assist it to reach the right decision in the public interest. The Board’s discretion is one that must be exercised within the parameters of the approved plans in question. Accordingly, if it takes into account material considerations which fall outside of the ambit of an approved plan, considerations which are therefore not relevant to it, it acts *ultra vires*.”

61. The Appeal Board must not trespass upon the TPB’s plan making function; whether the Appeal Board agrees with any plan or not is irrelevant; its duty is to see that the plans are faithfully implemented; if changes to the plan is desired, representations should be made to the TPB (*Town Planning Appeal No. 13 of 1993* (26 August 1994), §6).
62. The plan and the Notes attached to the plan are obviously material documents to which the Appeal Board are bound to have regard. On the other hand, although the Appeal Board is not bound to follow the Explanatory Statement or the relevant guidelines, they are material considerations and cannot be disregarded (*Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 267A-C).
63. Where a guideline has been introduced, there may be a good reason for departing from a guide in particular circumstances but the repository of a power is not at liberty to ignore, depart from or qualify the content of the provisions without cogent reasons (*Capital Rich Development Ltd v Town Planning Board* [2007] 2 HKLRD 155 at 182B-C, §81(5), citing, *inter alia*, *Shiu Wing Steel Ltd v Director of Environmental Protection & Airport Authority (No 2)* (2006) 9 HKCFAR 478 at p. 497).
64. With these principles in mind, this Appeal Board turns to the issues in this case.

**J. THE PLANNING INTENTION (ISSUES 1 & 2)**

65. Issue 1 is:

“What is the planning intention for the Site, which is within the “R(A)” zone on the Draft OZP, and is the proposed office development in line with such planning intention?”

66. Issue 2 (which the Respondent does not agree) is:
- “In particular, is the reference to “this zone is intended primarily for high-density residential developments” in the Explanatory Statement referable to the 38.58ha zone as “R(A)” in the Draft OZP, or to an area of 4,334m<sup>2</sup> within the said “R(A)” zone?”
67. These two issues are interrelated and should be considered together. They concern the correctness of TPB’s decision that the proposed office development would deviate from the planning intention of the “R(A)” zone and there are insufficient justifications to do so.
68. In respect of Issue 1, the Appellants contend that the planning intention for the Site is the same as that of the rest of the “R(A)” zone in the Draft OZP, namely that it is intended primarily for high density residential development, but that there is no intention to “maintain” the same as high-density residential development or exclusively for high-density residential development; and that offices and hotel developments may be permitted upon application to the TPB. In contrast, the Respondent contends that the planning intention is primarily for high-density residential developments. The proposed office development would not be in line with such planning intention because the relevant part of the “R(A)” zone in question would no longer be primarily for high density-residential developments. A planning intention that an area be “primarily” for high-density residential developments necessarily entails an intention to maintain it for primarily that purpose, and not others.
69. In respect of Issue 2, the Appellants claim that it must refer to the whole 38.58ha. The Respondent accepts that the reference to “this zone is intended primarily for high density developments” is referable to all the areas in the “R(A)” zone in the Draft OZP, including the Site. But it argues that it does not follow that, in applying the planning intention, the TPB or the Appeal Board should evaluate whether the entire 38.58ha zone would still be

primarily for high density residential developments if permission were granted. It claims that the focus should be on the Site.

70. Planning intention is a question of law admits of only one correct answer. It is to be ascertained from a proper construction of the approved OZP (including the Notes which form part of the plan), the Explanatory Statement (which does not form part of the plan) and the relevant factual matrix (*International Trader Limited v Town Planning Appeal Board and another*, HCAL13/2007 (15 November 2007, unreported), §§20-21). In *International Trader Limited v Town Planning Appeal Board and another* [2009] 3 HKLRD 339 at 353, §55, Hartmann JA held that:

“...it is necessary to ascertain the planning intention behind an approved plan. This is a matter of interpretation which is itself a matter of law and, as such admits of only one correct answer...”

71. In *International Trader Limited v Town Planning Appeal Board and another*, HCAL13/2007 (15 November 2007, unreported), §98, A Cheung J (as he then was) held that the Notes, the Explanatory Statement and the Guidelines must be read in:

“a down-to-earth, practical manner; and the language used is not to be invested with more precision than it would naturally bear. One is not reading a judgment, and still less, construing a statute. One is reading an explanatory statement prepared by the Planning Department to help members of the general public to better understand the planning intention behind the OZP (including the Notes). It is written for both developers and ordinary private landowners and citizens to read.”

72. More recently, in *Tam Hoi Pong v Town Planning Board* [2020] HKCFI 2265, Au JA held at §66:

“There is no dispute that the construction of a government or administrative policy is a question for the court, which should be considered in its proper contexts, background and with common sense. In carrying out the exercise, noting that this is in relation to an administrative policy, the court should not

adopt an overly technical approach as in interpreting statutes or legal or constitutional documents...”

73. The Respondent stresses the zoning history of the Site as mentioned above. This Appeal Board agrees that the zoning history forms part of the context against which various relevant documents ought to be construed. In *International Trader Ltd v Town Planning Appeal Board and another* [2009] 3 HKLRD 339 at 353, Hartmann JA (as he then was) held at §56:

“In the present case, the identification of the planning intention was a relatively narrow issue as it required a determination only of why it was that R(C)7 sites, which before amendment of the OZP had been zoned as R(A) sites, had been rezoned.”

74. The rezoning history assists us in understanding the objective of the exercise. Before the Site was rezoned, it may be used for residential or commercial use or both at the sole discretion of the owner; and the TPB had no control at all. The decision to rezone the Site indicated that it was decided that some control should be introduced. By rezoning the Site to “R(A)”, the owner is no longer entitled as of right to use the Site for residential or commercial use as it wishes. Generally speaking, it can only be used for the purposes expressly permitted in Column 1 of the Notes. And if the owner intends to use it for any other purposes, and if such other purposes fall with Column 2 of the Notes, it may be permitted with or without conditions upon a successful application under s.16 of the TPO. It is clear that it was a deliberate decision to rezone the Site as “R(A)” instead of “Commercial” having regard to the characteristics of the Site and other relevant planning considerations prevailing at the time of the rezoning exercise.

75. In our view, while it is useful to consider the history, once the Site has been rezoned and become a “R(A)” site, insofar as planning intention is concerned, it should be considered in the same way as any other “R(A)” sites. There is

no suggestion that there is any difference depending on whether a particular site becomes a “R(A)” site due to rezoning, or it is a “R(A)” site from the outset.

76. In considering the planning intention, in the light of the following authorities, this Appeal Board agrees with the Appellants that planning intention concerns the zone as a whole, and applies to all areas within the zone without regard to any particular area in that zone :

(a) In *Henderson Real Estate Agency Ltd v Lo Chai Wan* [1997] HKLRD 258 at 267E-F, the Privy Council held that:

“The first of the documents (other than the DPA plan) on which the Town Planning Board rely is the Explanatory Statement, issued on the same day as the plan. Paragraph 6.2.5(a)(iii) has already been quoted. The argument based on that paragraph is that it refers to the whole of the area of 525 hectares, and not just that part of the area which is nearest to Mai Po Nature Reserve. The primary planning intention for the *whole* area is to protect and conserve its landscape and ecological value, and its scenic qualities...”

(b) In *Town Planning Appeal No. 2 of 2004* (6 January 2005), §34, the Appeal Board held that:

“We note however that the OZP in question covers a large area, and *the planning intention described in the ES is intended to be a generalization for the area as a whole.*” (emphasis added)

77. This basic principle is also supported by the express wording of the Notes to the Draft OZP concerning “R(A)”:

“This *zone* is intended primarily for high-density residential developments. Commercial uses are always permitted on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building.” (emphasis added)

78. Insofar as Issue 2 is concerned, this Appeal Board takes the clear view that planning intention refers to all areas zoned “R(A)”, which include but are not

limited to the Site. The Respondent's argument seems to have confused two questions: the first question is what the planning intention (which applies to all areas within that zone) is; whereas the second and a different question is how relevant planning criteria should be applied to a particular site within that zone.

79. The planning intention of "R(A)" sites has been expressly set out in the relevant Notes to the Draft OZP, which should be construed together with §8.2 of the Explanatory Statement. The starting point is that this zone is "intended primarily for high density residential developments". It is, however, necessary to pay attention to the word "primarily" in that sentence. In its ordinary meaning, "primarily" means "mainly" or "principally", but not "exclusively".
80. There are two clear indications that there is no intention that this zone shall exclusively be used for high-density residential development. First, the second sentence of the relevant Notes states expressly that commercial use on the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building is always permitted. One should also look at various uses which are always permitted under Column 1, which are not confined strictly to residential uses.
81. Second, and more importantly for the present purpose, one must not overlook Column 2, which sets out uses which are not residential in nature, and which may be permitted without or without conditions upon successful applications under s.16. Moreover, the last sentence in §8.2.1 of the Explanatory Statement provides expressly that:
- "... Offices and hotel development may also be permitted upon application to the Board."

82. The general rationale for requiring planning permission for some uses is to be found in §4.1 of the Explanatory Statement:
- “... The provision for application for planning permission under section 16 of the Ordinance allows ***greater flexibility in land use planning and control of development to meet changing needs.***” (emphasis added)
83. The significance of putting a use under Column 2 can be discerned from the following authorities:
- (a) In *Town Planning Appeal No. 2 of 2004* (6 January 2005), §34, the Appeal Board held that:
- “...We also note that the use of the land for NTEH is included in column 2 of the schedule in the ES for agricultural use. This would at least indicate that the construction of the small houses on land zoned for agricultural use is ***not considered to be wholly inconsistent with the planning intention*** behind the “AGR” zoning...” (emphasis added)
- (b) In *Town Planning Appeal No. 15 of 2011* (27 February 2014), the Appeal Board held in §42:
- “In our view, the proposed Hotel is in line with the planning intention of R(A) zone, which is “intended for high-density residential developments”. This is reinforced by the fact that hotel use is listed under Column 2 of the Draft Plan, which is a permissible use subject to obtaining planning permission. This is reinforced by the fact that there is nothing in the Draft Plan, the Notes and the ES cited by the Appellant and the TPB which suggest that the development of a hotel on the Site is inconsistent with the planning intention of R(A) zone.”
84. It is clearly intended that each application for planning permission must be determined on its own merits. §13.3 of the Explanatory Statement put this beyond doubt:
- “Planning applications to the Board will be assessed on ***individual merits....***” (emphasis added)
85. It must also be intended that, in considering the individual merits of each application, the TPB or the Appeal Board must apply the relevant planning

criteria.

86. In this Appeal Board's view, Issue 1 should be answered as follows. The planning intention for the Site, and indeed all sites zoned "R(A)" in the Draft OZP, is that it should primarily be used for high-density residential development. Having said that, it would be consistent with the planning intention to use the lowest three floors of a building or in the purpose-designed non-residential portion of an existing building for commercial purposes. Further, it would also be consistent with the planning intention to permit other uses covered in Column 2 (such as office) *if* permission to do so (with or without conditions) is given based on the individual merits of a particular case by reference to the relevant planning criteria.
87. Put in another way, the mere fact that the Application involves using the Site as office does not necessarily mean that it would be a deviation from the planning intention if it is allowed. In this Appeal Board's view, the TPB's conclusion that the Application should be rejected because it would be a deviation from the planning intention of the "R(A)" zone is over-simplistic and wrong.
88. Mr. Austin suggested in his oral evidence that there was an additional planning intention in view of the rezoning history of the Site i.e. to maintain it for residential use. As planning intention is a question of law to be determined objectively, Mr Austin's subjective opinion in this respect is of little, if any, probative value. In any event, for reasons explained, the planning intention is clearly not as rigid and inflexible as suggested by Mr. Austin.

***K. THE PLANNING CRITERIA (ISSUES 3 AND 4)***

89. As just mentioned, the planning intention of sites within the "R(A)" zone is

that any application for use covered by Column 2 (i.e. use as office in this case) must be considered on its individual merits by reference to relevant planning criteria. The next question is what the planning criteria are. Criterion means a principle or standard by which something may be judged or decided. In the present context, we take the view that planning criteria should be taken to mean relevant planning considerations in deciding whether a permission should be granted under s.16 of the TPO. This is the subject matter of Issues 3 and 4 which should be considered together.

90. Issue 3 is:

“What are the planning criteria for permitting the redevelopment of residential buildings with the “R(A)” zone for office development?”

91. Issue 4 is:

“To what extent are the planning criteria for permitting the redevelopment of residential buildings within the “R(A)” zone for office development set out in the Guidelines?”

92. The Appellants submit that the answer to Issues 3 and 4 is that the planning criteria for permitting the redevelopment of residential buildings within the “R(A)” zone for office development are set out in §2 of the Guidelines. The Respondent submits that, in respect of Issue 3, the planning criteria for permitting the redevelopment of residential buildings within the “R(A)” zone for office development include the planning intention for the Site, the Guidelines and the underlying purposes of the TPO, insofar as the OZP permits; and in respect of Issue 4, the Guidelines are relevant guidance to the applicant as to the matters that it should address the TPB or the Appeal Board on if it wants to obtain planning permission; but they are not an exhaustive statement of the planning criteria in any given case.

93. There cannot be any doubt that one of the important planning criteria must be the Guidelines. The Guidelines set out relevant considerations that the TPB or the Appeal Board should generally take into account. This Appeal Board does not see any cogent reason to depart from the Guidelines in this case; and neither party suggests that we should do so.
94. It is correct that §2 of the Guidelines set out expressly the “Main Planning Criteria”. However, the word “main” connotes that §2 is not intended to set out all relevant planning criteria exhaustively. §3 of the Guidelines is a good example of another relevant planning criterion i.e. specific environmental and planning gain.
95. In construing and applying the Guidelines, in particular, the main planning criteria under §2 thereof, it is of course necessary to be in mind the context. The immediate context is the scope and objectives of the Guidelines as set out in §1. The wider context would include the planning intention of “R(A)” zone, and the statutory regime under the TPO.
96. It is also clear that there are other relevant planning considerations which have not been set out in the Guidelines. It is undesirable, if not impossible, to try to set out exhaustively all other relevant planning considerations. In some cases (as this one), there is a dispute whether a particular consideration is a relevant planning consideration at all. In deciding whether a particular consideration is relevant or not, one must have regard to the relevant legal precedents (including both judicial authorities and previous decisions of the TPA or the Appeal Board), the Guidelines, the planning intention of “R(A)” zone and the statutory context.
97. In answer to Issues 3 and 4, this Appeal Board takes the view that the planning criteria are set out non-exhaustively in the Guidelines, in particular, §2 thereof.

98. We now turn to the specific planning criteria in the Guidelines and other planning considerations which are in dispute between the parties.

***L. SHORTAGE OF HOUSING (ISSUE 7)***

99. One of the reasons given by the TPB in the TPB Decision to reject the Application is that “The cumulative effect of approving such applications will aggravate the shortfall in the supply of housing land”. What is in dispute is whether the alleged shortage of housing is a relevant planning consideration at all; and if so, what weight should be given to it.

100. Issue 7 is:

“Whether shortage of housing is a relevant planning consideration or criteria for the purpose of determining whether the TPB should grant permission under s.16 in this case?”

101. The Appellants contend that shortage of housing is not a relevant planning consideration or criteria for the purpose of determining whether the Appeal Board should grant permission under s.16 of the TPO in this case; it is in any event not a material consideration. In contrast, the Respondent argues that shortage of housing is a relevant planning consideration. Whether shortage of housing is a relevant planning consideration is a question of law. If but only if it is a relevant planning consideration would it be necessary to consider whether, and to what extent, it is a material consideration in this particular case (or what weight should be given to this factor).

102. As stated above, in law, the TPB or the Appeal Board’s discretion is one that must be exercised within the parameters of the approved plan in question; accordingly, if it takes into account material considerations which fall outside of the ambit of an approved plan, considerations which are therefore not

relevant to it, it acts *ultra vires* (*International Trader Ltd v Town Planning Appeal Board* [2009] 3 HKLRD 339 at 483, §51).

103. It is significant to note that the parties are referring to the shortage of housing in Hong Kong in general; rather than the shortage of housing in sites covered by the Draft OZP, or any particular area. For example, the Respondent mentions TPB Paper 10510, §7.13, which states that since the 2013 Policy Address, the top priority for the Government was to tackle the housing supply shortage problem (see in particular §52 of the 2013 Policy Address); and also §2.4 of the Report of the Task Force on Land Supply, which provides that “Among the 1200 ha of land shortage, housing land accounts for 230 ha, economic land accounts for 256 ha and the remaining 700 ha for infrastructure and facilities”. On the other hand, the Appellants refer to §138 of the 2019-20 Budget Speech to support that “The Government has all along strived to increase the supply of commercial floor area to meet the needs of industrial and commercial development”; and also the report “Hong Kong land supply: Don’t forget about office” published by JLL in September 2018.
104. We are inclined to the view that shortage of housing in Hong Kong in general is not a relevant consideration in the present context. First, it is vital to bear in mind that the TPB or the Appeal Board is not exercising any plan-making function. Considerations which are relevant to plan-making may not be relevant to s.16 applications. It appears that housing or other needs in general is a factor that ought to be, and has in fact been, taken into account in preparing the Draft OZP plan by designating different sites for different uses.
105. Second, none of the relevant documents permits or requires the TPB or the Appeal Board to consider shortage of housing in general. This is hardly surprising. Shortage of housing in Hong Kong is well known to be a difficult

and controversial topic. A general statement that there is a shorting of housing in Hong Kong is unhelpful. To carry out any meaningful analysis, it would be necessary to consider the particular area, the type of housing in question, a reasonable projection of demand in the future, etc. Further, it seems that, in Hong Kong, there is a shortage of not only residential units but also land for other uses. To increase the supply of residential units would necessarily reduce the supply of commercial (or non-residential) units. The difficult question in practice always is how to strike the proper balance between competing needs. Having regard to the limited statutory powers conferred on the TPB or the Appeal Board, it is difficult to see how the TPB or the Appeal Board can carry out any meaningful analysis or assessment in this respect.

106. More importantly, if one considers the Guidelines, it is reasonably clear that they were premised on the fact that “there has been an increasing demand for office units outside the central business district”. §1.1 of the Guidelines provides expressly that :

“Because of the expanding commercial activities in recent years, *there has been an increasing demand for office units outside the central business district*. The Town Planning Board’s intention is to meet part of the increasing demand through permitting the redevelopment of residential buildings within the “Residential (Group A)” zone for office use in districts where there is a demonstrated demand.” (emphasis added)

Put it another way, it is an underlying factual assumption of the Guidelines that there is an increasing demand for office units outside the central business district. It will be wrong for the TPB or the Appeal Board to depart from such factual assumption. If the factual assumption is no longer valid, the Guidelines should be revised.

107. Furthermore, the last sentence of §1 of the Guidelines also makes clear that the intention of the TPB is to “meet part of the increasing demand” through

granting s.16 permissions pursuant to the Guidelines in “areas where there is such a demonstrated demand”. Accordingly, what, at most, may be relevant is a demand for office units in the particular area in question; rather than demand for office units (or residential units) in Hong Kong in general. In TPB Paper No. 1101 (which led to the publication of the Guidelines), §3.4.1 provides that:

“While the economic viability of individual office developments is an entrepreneurial consideration, the wider economic context in which such developments will take place is a relevant point for consideration by the Board. The trend of economic development in Hong Kong and hence the effects on land development as well as the level of supply and demand for office floorspace *in particular areas* are factors that need to be considered. For *a particular area* where the trend of land development is towards increasing office developments, and there is a proven demand for more office accommodation that cannot be met by existing and planned supply, applications for office development at suitable locations may be favourably considered.” (emphasis added)

§6.1 provides further that:

“... While the wider district planning context and the potential general impacts such as reducing population density, meeting office demand and increasing local employment, should be taken into account in considering an application for office development, they should best be considered through zoning reviews of existing outline zone plans in the context of the Metroplan...”

108. For these reasons, in relation to Issue 7, we take the view that, in law, shortage of housing in Hong Kong in general is not a relevant consideration or criterion for the purpose of determining whether the TPB or the Appeal Board should grant permission under s.16 in this case.
109. Nevertheless, even if we were wrong in that shortage of housing is a relevant consideration, we take a clear view that it is not a material consideration on the facts of this case. At the moment, there are altogether 73 flats in the two residential buildings on the Site. Even if the Site is redeveloped into a

residential building, the total number of units will be very small. The net increase in housing supply will be even smaller. It seems also likely that fellow citizens who need housing the most would not be able to afford them having regard to the prestigious location of the Site. We tend to agree with the Appellants' description that any increase in housing supply will be "a drop in the ocean".

110. All in all, insofar that the TPB took into account the shortfall in the supply of housing land in the TPB Decision, we take the view that it was wrong both in law and on the facts. Having said that, it appears that the TPB was more concerned about the cumulative effect of approving such applications. This is a separate point concerning undesirable precedents which we shall consider below.

***M. THE MAIN PLANNING CRITERIA UNDER §2 OF THE GUIDELINES***

111. As mentioned, the main planning criteria are set out in §2 of the Guidelines. Among the six criteria, the Respondent only takes issue with one of them i.e. §2(e) of the Guidelines which provides that:

"The proposed office building should be compatible with the existing and planned land uses of the locality and it should not be located in a predominantly residential area."

112. The Appellants submit that the proposed office development is considered not incompatible with the surroundings because the Site is in a mixed-use area. The Respondent contends otherwise.
113. It should be noted that the Respondent only raises non-compliance with §2(e) of the Guidelines in this appeal. This is not one of the reasons given by the TPB in rejecting the Application.

114. §22 of the minutes of the TPB meeting held on 11 January 2019 provides that the Secretary clarified that “As the proposed development was considered not incompatible with the surrounding development, land use compatibility was not a rejection reason for the subject application”. In TPB Paper No. 10510, §5.2.7(b) sets out the comments of the Chief Town Planner/Urban Design and Landscape, Planning Department as follows:

“the Site is in close proximity to an area zoned “Commercial” along Wyndham Street, which is within an area shown as “SOHO and its immediate adjoining area” under the Explanatory Statement of the OZP. The scale of the proposal is not considered incompatible with the surrounding planning context. The proposed eating place/shop and services uses on the lowest three floors of the development would also help inject vibrancy and interest to the adjoining streetscapes.”

§5.2.9(a) sets out the comments of CTP/UD&L, Plan D:

“the Site is situated in an area of urban landscape character and medium to high rise residential and commercial buildings are common in the surrounding areas. The proposed development is considered not incompatible with the existing landscape character;...”

115. Notwithstanding the above comments, it is open to the Respondent to take issue with §2(e) of the Guidelines now. This Appeal Board is entitled, and indeed obliged, to exercise its independent judgment on this issue.

116. To consider this issue properly, it is necessary to consider the surroundings of the Site in more detail. §7.6 of TPB Paper No. 10510 states that:

“The Site is located in a mixed-used neighbourhood in close proximity to the commercial cluster along Wyndham Street and the wining and dining area of SOHO. The immediate neighbourhood of the Site is predominantly residential developments....”

117. In MPC Paper No. A/H3/438A for MPC meeting on 7 September 2018, §8.2 states that:

“The surrounding area has the following characteristics:

- (a) the triangular street block bounded by Wyndham Street to the northeast, Arbuthnot Road to the west and Glenealy to the southeast is predominantly a mixed-use area with retail shops and restaurants on the ground floor and offices or residential uses above;
- (b) to the east and south of the triangular street block are the Hong Kong Sheng Kung Hei Compound and Hong Kong Zoological and Botanical Gardens, while to the northwest is the Former CPS Compound; and
- (c) in close proximity to the area know as SOHO (south of Hollywood Road) with upmarket bars and eateries, Lan Kwai Fong is about 80m away.”

118. §8.1.6 of the Explanatory Statement of the Draft OZP refers to a Site Plan of “Soho and Its Immediate Adjoining Area” prepared by the Planning Department (reference no. M/H3/19/26). The Site is just outside the boundary of this plan.

119. The Respondent points out that, of the thirteen buildings close to the Site within the triangular street block, all except two are domestic buildings. The two exceptions are Glenealy Tower at 1 Glenealy which is an office building; and Ovolo at 2 Arbuthnot Road which is a hotel. Both of them were completed before the rezoning of the Site and its adjoin sites from “C/R” to “R(A)” in 2010. On the other hand, the Appellants point out that the Site is only 8 metres from Glenealy Tower, 35 metres from the “C” zone on Wyndham Street, and about 12 metres from the “Government, Institution & Community” zones on the other side of Glenealy.

120. The Respondent is focusing more on the immediate neighbourhood of the Site whereas the Appellants are focusing more on the wider context. It appears that the dispute between the parties turns on how one should define “the locality” in this particular case, and whether the Site should be considered to be located in a “predominantly residential area”.

121. The Appellants refers to the dictionary meaning of the word “locality” in the Oxford English Dictionary ie “a place or district of undefined extent, considered as the site occupied by certain persons or things, or as the scene of certain activities”. It also cites the following judgment of Smith J in *Johnson v The Minister for Planning* [2018] WASC 334, §126:

“The word “locality” in planning policies and planning scheme has been consistently interpreted by the State Administrative Tribunal as a flexible concept requiring a factual assessment of town planning impacts. In *Ridgecity Holdings Pty Ltd v City of Albany* the Tribunal observed:

The concept of the locality in town planning is necessarily flexible. However, the determination of the boundaries of the locality in any given case is generally concerned with town planning impacts. The locality of a site is the topographic area which relevantly affects or is affected by a proposed development. The characterization of the locality will depend on the impact in question and the circumstances of the case.”

In §134:

““Locality” can mean a specific definable area, such as a central business district, or a particular neighbourhood. It can extend to large or small areas. However, a “locality” must not be a remote or distant place, it must, by the terms of that word, be local. What constitutes a “locality” is necessarily a factual inquiry.”

In §135:

“... ..the principle is that generally in a planning context the word “locality” is to be construed flexibly in the context of particular circumstances of a matter.”

122. We would also refer to the following general statements made by judges of the English Court of Appeal in *R v Peterborough City Council, ex p Quietlynn Ltd* (1986) 85 LGR 249. Sir John Donaldson MR held that:

“I would also reject the submission that “the locality” needs to be defined in terms of drawing boundaries on a map. The statutory concept is very simple and there is no justification for this legalistic approach. Parliament has assumed, and it is a wholly reasonable assumption, that all premises can be said to be situated in a locality, a common expression which does not carry with it any connotation of precise boundaries, and that this locality will have a character”

Purchas LJ held that:

“The word “locality” in this context is a general concept rather than geographical delineation.”

123. Although it is unnecessary, if not impossible, to define a particular locality precisely by drawing boundaries on a map, it is not in serious dispute that, in practice, a particular locality is very often marked by natural or artificial boundaries such as roads, streams, mountains, etc. At the end of the day, the character of a locality is a question of fact; it may well be a matter of impression. Apart from considering the evidence and submissions made by the parties on this point, all five members of this Appeal Board are familiar with the surroundings of the Site and have personal knowledge thereof.
124. It is on this factual issue that this Appeal Board is unable to reach a unanimous decision. Two members, namely, Ms. Julianne Jen and Mr. Edwin Yeung Chi-wai, opine that the locality of the Site is a mixed area; and hence, §2(e) of the Guidelines has been satisfied. Two members, namely, Ms. Irene Chow Man-ling and Mr. Thomas Hui Chun-sing and the Chairman, Mr. Paul Lam Ting-kwok SC, take the view that the locality of the Site is a predominantly residential area; and hence, §2(e) of the Guidelines has not been satisfied.
125. In short, the minority believes that a resident living at Glenealy would feel living in a mixed area; in particular, one cannot ignore the hustle and bustle of the CBD in the north side.
126. The majority acknowledges that the Site was indeed close to commercial buildings, including restaurants and bars, along Wyndham Street. However, if one turns from Wyndham Street to Glenealy, and continues to walk up the fairly steep gradient along Glenealy (which is not particularly easy), one

would start to feel the change in atmosphere. The commercial buildings start to disappear; most of the buildings around are residential; and it becomes much more quiet and tranquil. On the opposite side to Glenealy would be the Hong Kong Sheng Kung Hei Compound, which is also quiet and peaceful most of the time. If one walks down from Caine Road at Mid-level which is indisputably residential in character, one would also feel that Glenealy is a continuation of the residential area. All in all, the majority takes the view that the Site is situated in a locality which is a predominantly, though not exclusively, residential area.

127. For these reasons, this Appeal Board, by majority, finds that one of the main planning criteria i.e. §2(e) of the Guidelines has not been satisfied. In law, even though other planning criteria in §2 are not in issue, non-compliance with §2(e) is, by itself, a sufficient ground to reject the Application. Having said that, we shall refrain from coming to any conclusion until we have considered all other relevant planning considerations.

***N. §3 of THE GUIDELINES (ISSUE 5)***

128. Issue 5 is:

“What, on the true interpretation of the Guidelines, is the effect of §3 of the Guidelines?”

129. To recap, §3 of the Guidelines provides that:

“In general the Board will give favourable consideration to planning applications for office developments which produce specific environmental and planning gains ...”

130. The Appellants contend that the offer of a planning gain is not a necessary condition for the grant of planning permission under s.16, but that any offer of planning gain will be considered as a positive reason why planning permission should be granted. The Respondent argues primarily that §3 is an

additional precondition that ought to be satisfied before permission may be granted, the planning gain must be meaningful and sufficient to justify the proposed development; alternatively, it is at the very least an important factor in deciding whether permission should be granted.

131. We take the view that the Respondent has put its case too high by suggesting that §3 imposes a precondition. This is not what §3 says. It merely provides that, in general, favourable considerations will be given if the proposed development will produce specific planning or environmental gain. As mentioned, the Guidelines were based on planning considerations taken into account in previous planning applications. As pointed out by the Appellants, in respect of applications between January 1988 and August 1989 which had been approved, many of them did not involve any environmental or planning gain. In our view, environmental or planning gain is merely a positive factor which may support granting planning permission. The absence of any environmental or planning gain should not, by itself, be a sufficient reason to reject an application. We also disagree that this factor should be characterized as an “important” one in general as suggested by the Respondent. The weight that ought to be given to this factor must depend on the facts of each individual case.

132. Returning to the facts of this case, the Appellants submit that the proposed office development would produce the planning gain of a widened footpath, which was welcome by the Transport Department. §5.2.2(c) of TPB Paper 10510 states that:

“TD welcomes the proposal of building setback of about 2.7m to make way for a wider footpath. The existing footpath of about 2.9m will then be widened to about 5.6m to provide space for landscaping and/or street furniture to enhance the street amenity and walking environment.”

133. The Respondent submits that the only purported planning gain is the widening of an existing 2.9m-wide footpath by 2.7m. However, the ingress/egress point has occupied about one-third of the street frontage at Glenealy and the additional foot-traffic engendered by the proposed office development might offset the benefits of footpath widening. Further, the proposed setback can also be achieved by a new residential development at the Site under the requirements of the Sustainable Building Design Guidelines which requires buildings fronting a street less than 15m wide to be set back in order to claim GFA concessions.
134. We do not think whether the same or substantially similar planning gain can be obtained if the Site is redeveloped into a residential building is of much relevance. We agree that the planning gain cannot be said to be *de minimus* in the sense of being negligible. This is a genuine planning gain that we ought to take into consideration. Having said that, we agree with the Respondent that not much weight should be given to this planning gain. To begin with, there is no suggestion that the existing footpath is insufficient. More importantly, any benefits caused by the widening of the footpath need to be considered with the following matters in mind. There is likely to be an increase in pedestrian flow; and a part of the widened footpath would be occupied by vehicles from time to time as the ingress or egress points to and from the building.
135. In short, although we agree that planning gain is a relevant consideration, the planning gain of the proposed office development in this case is not substantial and not much weight should be given to it.

***O. UNDESIRABLE PRECEDENTS***

136. One of the reasons given by the TPB in rejecting the Application is that:

“approval of the application will set an undesirable precedent for similar applications in the same “R(A)” zone.”

137. We agree that the concern that allowing a planning application may set an undesirable precedent may be a relevant consideration if but only if similar sites with similar characteristics can be identified. In *Smart Gain Investment Ltd v Town Planning Board*, HCAL12/2006 (6 November 2007, unreported), A Cheung J (as he then was) held at §109 that:

“Depending on the facts, the apprehension of setting an undesirable precedent could be a relevant consideration. However, it all depends on the facts.”

At §110, he added:

“... When one talks about setting an undesirable precedent, one must compare like with like. Approving the rezoning request in relation to Site 1 would only set a precedent for approving applications involving similar sites with similar characteristics in the future.”

138. Failure to conduct a proper evaluation of the differences among different sites, and explain why they should be treated alike may constitute *Wednesbury* unreasonableness under the public law (*Jonnex International Ltd v Town Planning Board* [2018] 1 HKLRD 577 at 598-599, §§63-67).

139. In *Hong Kong Resort Co Ltd v Town Planning Board* [2020] HKCFI 1956, Au JA held at §86 that:

“Hence, for the TPB to come to the conclusion in that the approval of the Application could constitute an undesirable precedent, it had to have proper and reasonable basis (a) to say that the rezoning application of Area 6f was similar to other applications that might follow; and (b) to conclude that approving the Application would constitute a strong basis to require the TPB to approve subsequent similar applications.”

140. There were fourteen similar applications for office developments within the “R(A)” zone of the Draft OZP: all these applications except A/H3/402 (2012) and A/H3/432 (2017), both at 2-4 Shelley Street, Sheung Wan, were

processed before 2003. Out of these fourteen applications, ten were approved with conditions and four were rejected. Since rezoning on 7 May 2010 up to 11 January 2019, there were only three similar applications: two approved with conditions (i.e. 2-4 Shelley Street) and one rejected.

141. The Respondent contends that there are nine other sites in the “R(A)” zone in the immediate neighbourhood, and at least three of them are relevantly similar to the Site i.e. Nos.4-8, 10-14 and 18-20 Arbuthnot Road. These three sites can hypothetically be redeveloped for office use with internal transport facilities and without amalgamation with other sites.
142. In fact, there was no application for planning permission in respect of any of these sites since the rezoning in 2010. The Respondent points out that, unlike the Site, all those three sites are now in multiple ownership. Although it is possible that a developer might be interested to acquire those sites if the Application succeeds, there is no evidence that any developer has any present intention to do so, and there is also no evidence on the likelihood that this may happen at any time in the foreseeable future. It is also well known that it is not easy to unify ownership in these circumstances. Although it is possible for a single owner to make a s.16 application, it is highly unlikely that in practice an application will be made when ownership has not been unified.
143. Furthermore, it is trite that each s.16 application must be decided in accordance with its individual merits. Assuming that the Application is allowed, and a similar application is then made in respect of any of the three sites, it would still be necessary for the TPB (or the Appeal Board) to consider any such application by reference to the Guidelines and other planning considerations. Apart from close proximity and size of the sites, the Respondent has not carried out any detailed comparison between those sites

with the Site. One cannot assume that the main planning criteria under §2 of the Guidelines will necessarily be satisfied if an application in relation to those other sites is made. For example, if the Application is allowed, there would be an office building in the vicinity. Any additional office building is likely to affect materially the traffic flow further. In such circumstances, it will be hard to predict whether a traffic impact assessment can satisfy the requirement under §2(d) of the Guidelines.

144. In the circumstances, we are not convinced that there is sufficient evidence to support a reasonable fear that allowing the Application will set an undesirable precedent.
145. Accordingly, we disagree with the TPB that the fear of setting an undesirable precedent constitutes a good reason to reject the Application.

***P. CONCLUSION (ISSUES 6 & 8)***

146. Issue 6 is:

“Does the proposed office development meet the planning criteria for permitting the redevelopment of residential buildings within the “R(A)” zone for office development?”

Issue 8 is:

“Are the TPB’s reasons for rejecting planning permission in, *inter alia*, the Board’s letter dated 28 January 2019 good reasons? If not, should planning permission be granted or refused by this Appeal Board in the exercise of its own independent planning judgment in accordance with the law?”

147. These are indeed the ultimate issues that we need to decide, and the answers depend on our answers to the other issues already considered.
148. As to Issue 6, the Appellants submit that the proposed office development meets all the planning criteria for permitting the redevelopment of residential

buildings within the “R(A)” zone for office development. The Respondent submits that the proposed development does not meet the planning criteria because it is not in line with the planning intention of the relevant part of the “R(A)” zone in question, it does not satisfy the Guidelines, it is not sufficiently justified, it would set an undesirable precedent and the cumulative impact of similar applications would aggravate the shortfall of housing supply.

149. As to Issue 8, the Appellants submit that the reasons of the Respondent for rejecting the planning permission were plainly wrong and planning permission should be granted by this Appeal Board. The Respondent submits that the TPB’s reasons for rejecting planning permission are good reasons; and this Appeal Board should, in any event, refuse planning permission in the exercise of its own independent planning judgment.
150. We shall deal with Issue 8 first. For reasons that we need not repeat, we take the view that the TPB’s reasons for rejecting planning permission as set out in the TPB Decision are not good reasons. In the circumstances, we have decided to consider the matter afresh by exercising our independent planning judgment.
151. In respect of Issue 6, we shall summarise our views as follows:
  - (a) The planning intention refers to all sites zoned as “R(A)” in the Draft OZP and not merely to the Site. To allow the Application will not necessarily be inconsistent with the planning intention. The intention is that applications for planning permission must be decided on its individual merits by taking into account relevant planning criteria or considerations, in particular, the Guidelines.
  - (b) Shortage of housing in Hong Kong in general is not a relevant planning criterion. Alternatively, if it is relevant, it is not a material consideration

on the facts of this case as any increase in supply of residential units if the Site is redeveloped into a residential building will be “a drop in the ocean”.

- (c) The widened footpath under the proposed development is a relevant planning gain that ought to be taken into account. However, the gain is not substantial and carries little weight.
- (d) There is insufficient evidence to justify a reasonable fear that allowing this Application will set an undesirable precedent.
- (e) At the end, what is critical is whether the main planning criteria set out in §2 of the Guidelines have been met. The majority of this Appeal Board takes the view that §2(e), which is the only one in issue, has not been satisfied on the ground that, having regard to the character of the locality, the Site is situated in a predominantly residential area.

152. This Appeal Board is obliged to take, and has taken, all relevant planning criteria or considerations into account. Ultimately, the majority comes to the conclusion that, as one of the main planning criteria has not been satisfied, the Application should be rejected. This is how this Appeal Board (by majority) would answer Issue 6.

153. For the above reasons, the Appellants’ appeal is dismissed.

154. Under s.17B(8)(c) of the TPO, the Appeal Board has power to “award to a party such costs legal or otherwise as it considers reasonably incidental to the preparation and presentation of an appeal.” Although we have decided to dismiss the Appellants’ appeal, we come to such conclusion on grounds not canvassed previously and we disagree with the reasons given by the TPB in the TPB Decision. In the circumstances, we are inclined to the view that a fair and reasonable order is that each party shall bear its own costs. However, as

we have not heard submissions from the parties on costs, if any party intends to seek costs, it shall make a written application within 14 days hereof; and after that, the other party shall submit a written response within 14 days. We shall then resolve the issue on paper. In the absence of any such application, our proposed order on costs shall become final.

(Signed)

---

Mr. Paul LAM Ting-kwok, SC

(Chairman)

(Signed)

---

Ms. Irene CHOW Man-ling

(Member)

(Signed)

---

Mr. Thomas HUI Chun-sing

(Member)

(Signed)

---

Ms. Julienne JEN

(Member)

(Signed)

---

Mr. Edwin YEUNG Chi-wai, MH

(Member)